

California Fair Political Practices Commission

M E M O R A N D U M

To: Chairman Getman and Commissioners Downey, Knox, Scott, and Swanson

From: Luisa Menchaca, General Counsel
John W. Wallace, Assistant General Counsel

Subject: Approval of Regulation Calendar for the Year 2002

Date: November 27, 2001

Introduction

This memorandum outlines the staff's recommendations for the Commission's CY2002 rulemaking plan. The rulemaking/project calendar is attached as **Appendix 1** and is consistent with the Commission's stated priorities for next year and the priorities set out in the staff memorandum in November. The work plan also allows for quarterly review and revisions and attempts to spread the workload as evenly as possible throughout the year. Please note, however, that since this calendar is being presented in advance of the consideration of the scope and scheduling of the two special projects (enforcement policy review and conflict of interest codes/statements of economic interests project), we have inserted tentative placeholders in the calendar which are subject (and likely) to change. In addition, items summarized in the November memorandum but that will not be pursued in 2002 are listed at the end of the calendar. The staff recommends approval of the regulatory calendar as described below.

1st Quarter (January – March); CY 2002.

January 2002.

Working Group/Interested Persons' Meeting.

- ❖ **Lobbyists: Public Utilities Commission (AB 1325):** Modifies the definition of payments to influence legislative or administrative action to include payments for the purpose of influencing a ratemaking or quasi-legislative proceeding before the PUC. Existing provisions of the Act generally define a "lobbyist" as an individual who receives \$2,000 or more in a calendar month or whose principal duties are to communicate directly or through agents with an elective state official, agency official, or legislative official for the purpose of influencing legislative or administrative action. The new legislation provides that a proceeding before the PUC constitutes "administrative action" for purposes of this provision if the proceeding is a "ratemaking proceeding" or a "quasi-legislative proceeding" as defined by this bill, except as specified. Amendments will be needed to make the Commission's regulations consistent with this legislative change.

Pre-Notice

- ❖ **Advertising Disclosure -- §§ 84501-84510:** These provisions are surviving provisions added by Proposition 208. The purpose of the advertising disclosure rules is to inform voters of the “big money” behind political advertisements. However, interpretive issues exist with respect to whether advertisements for or against a ballot measure are subject to §§ 84502-84504 or § 84506 (governing independent expenditures), or both. Additional issues that may be clarified by regulation: what types of advertisements are subject to the rules; are there exceptions; clarification of the term “cumulative contributions” as defined in § 84502; the treatment of independent expenditure advertisements under § 84506; the specific content of the disclosure; and under what circumstances must a disclosure be amended. (*Emergency Adoption may be Necessary*)
- ❖ **Regulation 18452 – CalPERS’ Reporting Requirements:** § 84225 requires candidates for the Board of Directors of CalPERS to file certain campaign reporting statements. Regulation 18452, as directed by statute, sets forth the filing schedule and describes the contents of those statements. CalPERS prepared an election schedule that provided for runoff elections under certain circumstances, requiring amendment of regulation 18452, since the regulation makes no provision for the filing of statements required by law during runoff election cycles. In addition, it is unclear where these candidates file.
- ❖ **Member Communications (Definition of Terms “Member,” “Employee,” “Shareholder,” “Families,” “Communications,” and “Organization”) §§ 85312, 85205.** § 85312 provides that certain payments for communications to “members, employees, shareholders, or families of members, employees, or shareholders of an organization” are not contributions or independent expenditures. While the Act currently provides a definition for the term “immediate family” pertaining to conflict of interest and disclosure rules, the term “families” as used in § 85312 may be interpreted more broadly. Similarly, other undefined terms of this section including “member,” “employee,” “shareholder,” “communications,” and “organization” warrant examination and definition by the Commission. (*Emergency Adoption may be Necessary*)
- ❖ **Political Party Definition (§ 85303):** § 85303 provides limitations on contributions “for the purpose of making contributions to candidates for elective state office.” § 85303 also provides a higher contribution limit for political party committees. A regulation setting forth criteria for determining when a contribution falls within this section may be required.

Adoption

- ❖ **Paid Spokesperson -- § 84511:** Proposition 34, passed in November 2000, added § 84511 which addresses paid spokesperson disclosures in ballot measure advertising. Section 84511, amended by Senate Bill 34, requires filing and disclosure by any committee when a spokesperson appears in an advertisement and is paid \$5,000 or more.

- ❖ **Personal Loans (§ 85307):** Section 85307 prohibits a candidate for elective state office from personally loaning to his or her campaign an amount, the outstanding balance of which exceeds \$100,000. Proposition 34 does not clearly set forth what types of loans are considered personal loans subject to the \$100,000 prohibition.
- ❖ **Voluntary Expenditure Limits (§ 85402(b))** Proposition 34 established a voluntary expenditure limit for candidates for elective state office. Section 85402 provides, however, that candidates who declare their intent to abide by those limits are relieved of that obligation if another candidate contributes personal funds to his or her own campaign in excess of the applicable limits for that office. To implement the new statute, staff has drafted several versions of a proposed regulation to be adopted on an emergency basis.

Other

- ❖ **Conflict of Interest Codes/Statements of Economic Interests--Overview.** Staff from the Technical Assistance Division and Legal Division will present an overview of the Commission's role in reviewing agency conflict of interest codes and its role as the filing officer for approximately 20,000 statements of economic interests. This overview will lead to consideration of areas where the Commission might improve its role in these processes.

February 2002.

Working Group/Interested Persons' Meeting.

- ❖ **Definition of "Independent Expenditure":** § 82031 defines "independent expenditure" to mean "an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee." There is currently no regulation clarifying this rule. The Commission may wish to consider a clarifying regulation.
- ❖ **Appointed Boards and Commissions (regulation 18707.4):** Regulation 18707.4 permits public officials to represent certain constituencies, which they are explicitly appointed to represent. Under regulation 18707.4, as long as certain conditions are met, a public official can participate in a decision when the decision has a reasonably foreseeable material financial effect on his or her economic interest. Under some circumstances, the staff has applied this rule to officials who are appointed to represent a specific economic interest, even where the decision impacts an economic interest other than the interest the official is expressly required to represent.

Pre-Notice

- ❖ **None**

Adoption

- ❖ **Aggregation of Contributions:** Regulation 18428 addresses the disclosure and notification requirements of affiliated entities that participate in the financing of elections. (§ 84211.) Originally, regulation 18428 implemented the Commission's *Kahn* ((1976) 2 FPPC Ops. 151) and *Lumsdon* ((1976) 2 FPPC Ops. 140) opinions requiring a "combination of persons" to file one campaign statement. The regulation defined "affiliated entities" as "a person or group of persons whose campaign contributions are directed and controlled by another." The Commission will consider issues raised by regulations 18428, 18215.1, 18225.4, and 18531.1.

Other

- ❖ **None**

March 2002.

Working Group/Interested Persons' Meeting.

- ❖ **None**

Pre-Notice

- ❖ **Lobbyists: Public Utilities Commission (AB 1325).**

Adoption

- ❖ **Advertising Disclosure -- §§ 84501-84510.**
- ❖ **Regulation 18452 – CalPERS' Reporting Requirements.**
- ❖ **Member communications (definition of terms "member," "employee," "shareholder," "families," "communications," and "organization") (§§ 85312 and 85205).**
- ❖ **Political Party Definition (§ 85303).**

Other

- ❖ **None**

**Second Quarter (April 2002 – June 2002).
April 2002.**

Working Group/Interested Persons' Meeting.

- ❖ **Definition of “Independent Expenditure”:** § 82031 defines “independent expenditure” to mean “an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee.” “Made at the behest of” means made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of the candidate or committee. The Commission may wish to consider further clarification of this rule.

Pre-Notice

- ❖ **Appointed Boards and Commissions (regulation 18707.4).**

Adoption

- ❖ **None**

Other

- ❖ **Enforcement policy review:** Enforcement policy discussions focusing on a substantive area, e.g. laundering, conflicts of interest and reporting violations. During those discussions, the staff and Commission would review the elements of a violation; whether our enforcement in this area would benefit from changes in our regulations or advice; the Commission’s past treatment of similar violations; the factors weighed in deciding whether to prosecute and if so, whether to proceed administratively or civilly; and the appropriate fine level, including a discussion of mitigating and aggravating factors that should be considered for each type of violation. The goal of each discussion would be to emerge with a statement of Commission policy with respect to those types of violations, with the understanding that staff must continue to have great flexibility and discretion in dealing with the differences in individual cases. Implementation would follow in accordance with a schedule approved by the Commission.
- ❖ **Conflict of Interest Codes/Statements of Economic Interests.**

May 2002.

Working Group/Interested Persons' Meeting.

❖ **None**

Pre-Notice

- ❖ **Proposition 34; Review of Recordkeeping:** Regulation 18401 sets forth the Commission's recordkeeping guidelines. Proposition 34, a campaign finance reform measure sponsored by the Legislature and passed in November of 2000, took effect on January 1, 2001. Proposition 34 repealed most of the provisions of Proposition 208, a campaign reform measure, which passed in the November 1996 elections and has been in litigation in federal court. In addition, Proposition 34 repealed several provisions of Proposition 73 in the Act, a campaign reform measure adopted in 1988, that were largely invalidated by court decision. New provisions added to the Political Reform Act by Proposition 34 impose mandatory limits on contributions received by candidates for elective state office and by committees that make contributions to candidates for elective state office. New law also subjects state candidates to voluntary expenditure limits. All of these changes in law require the review of and possible amendment to regulation 18401 to support the new contribution and expenditure limits.

Adoption

- ❖ **Lobbyists: Public Utilities Commission (AB 1325).**

Other

June 2002.

Working Group/Interested Persons' Meeting.

❖ **None**

Pre-Notice

- ❖ **Definition of "Independent Expenditure."**
- ❖ **Annual Technical Clean-up:** The Commission is presented this month with a number of changes to Commission regulations that resulted from the staff's annual review for technical and other minor changes.

- ❖ **Cost of Living Adjustment to Contribution and Expenditure Limits; Statutorily Required Changes (§ 83124):** Pursuant to § 83124, the Commission must adjust the contribution limitation and voluntary expenditure limitation provisions in §§ 85301, 85302, 85303, and 85400 in January of every odd-numbered year to reflect any increase or decrease in the Consumer Price Index. Those adjustments shall be rounded to the nearest one hundred dollars for limitations on contributions and one thousand dollars for limitations on expenditures. A regulation setting forth the method for making the adjustments will be presented.

Adoption

- ❖ **Appointed Boards and Commissions (regulation 18707.4).**

Other

- ❖ **None**

Third Quarter (July 2002 – September 2002)

July 2002.

Working Group/Interested Persons' Meeting.

- ❖ **Direct/Indirect Standards regarding Real Property, regulation 18704.2:** Regulation 18704.2 sets out a list of factual situations in which an official's real property interest is considered directly involved in a governmental decision. In December of 2000, the Commission added two situations (formerly defined as "indirect" situations) into regulation 18704.2. These provisions dealt specifically with (a) real property located within 300 feet of the boundaries (or proposed boundaries) of the real property which is the subject of the governmental decision, and (b) decisions involving the construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities. In connection with this relocation of text, the Commission also increased the distance at which an official's real property is considered to be directly involved from 300 feet to 500 feet. In this regard, an issue has arisen as to whether the "500 foot rule" embodied in regulation 18704.2 is applicable only to the decisions expressly set forth in the regulation, or whether it can be applied to decisions that are not expressly included in the regulation. A literal reading of the new language would limit the "500 foot" test only to those decisions listed in (a)(1) through (a)(6). In other words, an official with real property within 500 feet (or 50 feet for that matter) of real property subject to a decision not expressly listed in (a)(1) through (a)(6), would be subject to a presumption of nonmateriality.
- ❖ **Conflict of Interests and General Plans:** Some agencies are viewing general plan amendments as coming with the purview of "zoning or rezoning" decisions under subdivisions (a)(1) and (a)(6) of the regulation. Because general plans cover the entire

jurisdiction, officials of these agencies believe they cannot participate in such decisions unless the “public generally” or “legally required participation” exceptions apply. This results in substantial difficulties, in that all of the members of a governing board of an agency may be unable to participate in some of the most fundamental decisions affecting the entire jurisdiction. Staff is anticipating regulatory action involving clarification of and refinement to the conflict of interest rules as applied to these types of decisions. This project will also include consideration of the “segmentation and bifurcation” procedures referred to in Commission advice letters. The procedure is used when a governmental decision may be “segmented” into a series of decisions in which a public official may have a conflict in one decision in the series but not others.

- ❖ **Business Entity Materiality Standards, regulation 18705.1:** Regulation 18705.1 sets forth the materiality standards applicable to business entities in which the public official has an interest. The Commission adjusted the indirect materiality thresholds to reflect changes resulting from inflation since the original adoption of the regulation. The regulation also references the listing criteria for various stock exchanges as an alternative benchmark for the application of graduated materiality standards based on the size of the business. Put another way, these are self-adjusting benchmarks that correlate different materiality standards to businesses of various sizes. There has been some feedback from the regulated community to the effect that the complexity of the listing criteria for the various exchanges makes it difficult for officials to use them in determining the appropriate materiality standard for a business interest. The assertion is that a public official cannot tell without extensive analysis whether a given business investment meets the criteria for listing on a given stock exchange. The initial review of the listing criteria for the various exchanges does bear out the regulated community’s contention as to the complexity of the listing criteria. However, to strike an appropriate balance between “user-friendly” criteria and criteria that accurately gauge the size of a given business, it will take further research and work by staff to develop alternatives for Commission consideration.
- ❖ **Small Cities Public Generally, regulation 18707.3:** Regulation 18707.3 provides an exception geared specifically toward small jurisdictions. Several amendments were made to this regulation to make it consistent with the amended materiality regulations applicable to real property. The City of Yountville has also raised concerns with the application of this regulation in that it incorporates the “500 foot rule” as one of the preconditions for application of the “public generally” exception for small jurisdictions. Basically, when a circle is drawn using a 500 foot radius from the residences of city council members, the resultant areas encompass much of the town. Staff is currently reviewing the regulation to see if language can be tailored to meet this unique concern of small cities.

Pre-Notice

- ❖ **Definition of “Independent Expenditure” (Second Pre-notice).**

Adoption

- ❖ **None**

Other

- ❖ **Conflict of Interest Codes/Statements of Economic Interests.**

August 2002.

Working Group/Interested Persons’ Meeting.

- ❖ **None**

Pre-Notice

- ❖ **Lobbyist Contributions (§ 85702):** Section 85702 prohibits contributions by a lobbyist to elected state officers or candidates for elected state office, if the lobbyist is registered to lobby the government agency of the elected state officer or the agency to which the candidate seeks election.

Adoption

- ❖ **Annual Technical Clean-up.**
- ❖ **Cost of Living Adjustment to Contribution and Expenditure Limits; Statutorily Required Changes (§ 83124).**
- ❖ **Proposition 34; Review of Recordkeeping.**

Other

September 2002.

Working Group/Interested Persons’ Meeting.

- ❖ **None**

Pre-Notice

- ❖ **Direct/Indirect Standards regarding Real Property, regulation 18704.2.**
- ❖ **Conflict of Interest and General Plans.**
- ❖ **Business Entity Materiality Standards, regulation 18705.1.**
- ❖ **Small Cities Public Generally, regulation 18707.3.**

Adoption

- ❖ **Definition of “Independent Expenditure.”**

Other

- ❖ **Enforcement policy review.**

**Fourth Quarter (October – December 2002)
October 2002.**

Working Group/Interested Persons’ Meeting.

- ❖ **None**

Pre-Notice

- ❖ **Regulation 18991: Selection of Local Candidates and Controlled Committees for Audit:**
Regulation 18991 dictates the procedure that shall be followed by the Commission for selecting local candidates and their controlled committees for audit by the Franchise Tax Board. It specifies a random selection process, in which cities and counties are grouped together by population, and then varying percentages of each group are selected for audit. According to subdivisions (d) and (e) of regulation 18991, the population information that shall be used in determining how cities and counties will be grouped, is the most recent decennial federal census. Subdivision (e) of regulation 18991 allows the population of a new city – *one that has come into existence since the last census* – to be determined by “other reliable data.” Two problems have become evident with this process. First, the use of two different sources for population data seems to inject an element of unfairness into the selection process. Second, the use of data as old as ten years for existing cities and counties simply ignores the dynamic population changes that occur in the state. The “E-1 Report of City and County Population Estimates” is prepared annually by the Demographic Research Unit of the California Department of Finance. This report has always been available on a

timely basis and has been used for new cities. Additionally, the Demographics Unit has been designated as the “single official source of demographic data for State planning and budgeting.” Thus, the Commission may wish to amend subdivisions (d) and (e) of regulation 18991, to delete the references to “the most recent decennial federal census” that are contained in those subdivisions, and replace them with references to “the most recent annual population estimates compiled by the California Department of Finance.”

Adoption

❖ **Lobbyist Contributions (§ 85702).**

Other

❖ **Conflict of Interest Codes/Statements of Economic Interests**

November 2002.

Working Group/Interested Persons’ Meeting.

❖ **None**

Pre-Notice

❖ **None**

Adoption

❖ **Direct/Indirect Standards regarding Real Property, regulation 18704.2.**

❖ **Conflict of Interests and General Plans.**

❖ **Business Entity Materiality Standards, regulation 18705.1.**

❖ **Small Cities Public Generally, regulation 18707.3.**

Other

❖ **Conflict of Interest Codes/Statements of Economic Interests**

December 2002.

Working Group/Interested Persons' Meeting.

❖ **None**

Pre-Notice

❖ **None**

Adoption

❖ **Regulation 18991: Selection of Local Candidates and Controlled Committees for Audit.**

Other

❖ **None**

Attachment